GANAPATHY RENGASAMY

v.

PUBLIC PROSECUTOR

FEDERAL COURT, KUALA LUMPUR
CHONG SIEW FAI CJ (SABAH & SARAWAK)
EDGAR JOSEPH JR FCJ
SHAIK DAUD ISMAIL JCA
[CRIMINAL APPEAL NO: 05-107-93]
18 JUNE 1997

CRIMINAL PROCEDURE: *Judgment - Grounds of judgment - Trial judge - Importance of "speaking judgment" - Substantial reproduction of prosecution witnesses' testimony - Whether trial judge analysed or assessed testimony - Whether defence assessed - Whether trial judge must consider a 'weak' defence*

CRIMINAL LAW: *Dangerous Drugs Act 1952, ss. 39B(1)(a) & 37(d) - Possession - Definition - Burder of proof - Presumption - Shifting of burden - Whether presumption rebutted - Whether there was misdirection or non-direction on part of trial judge - Whether accused had knowledge of dangerous drugs*

The appellant was convicted in the High Court for trafficking in heroin under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and was sentenced to death. The present appeal was by the appellant against his conviction.

The appellant was arrested whilst carrying a bag which contained heroin. While admitting that he was carrying the bag, the appellant vehemently denied any knowledge of its contents. He claimed that the bag was handed over to him by his employer, one Rahman. His defence was therefore one of an innocent carrier.

Held:
Per Shaik Daud Ismail JCA

[1] The grounds of judgment of the learned judge were far from satisfactory in that they did not convey a "speaking" judgment although the importance of this has been stressed in a number of decided cases. The judgment consisted substantially of a reproduction of prosecution witnesses' testimonies in the form of questions and answers. The learned judge failed to analyse or assess these testimonies but merely set them out and presumably accepted them without question. He did not set out the defence of the appellant with a view to assessing it, nor did he test the defence by comparing it with the evidence adduced by the prosecution.

[2] However weak a defence may be, trial judges being judges of both fact and law should not just brush aside the defence on the basis that the prosecution witnesses are to be believed and not the defence witnesses. Where the law casts the onus of giving an explanation upon an accused person, and the explanation is given, the court is duty bound to consider whether it might reasonably be true, although not convinced of its truth.

[3] The word "possession" is a vague and general word which cannot be closely defined. It implies some general knowledge as to the existence of a chattel and some idea of its whereabouts in order to exercise some control over it though not necessarily full or exact knowledge.

[4] The burden on the prosecution throughout was to prove its case beyond a reasonable doubt. But, once the prosecution proved that the appellant had custody or control of the bag containing the drugs in question, then by s. 37(d) of the Act, he was deemed to have been in possession of such drugs and to have known of the nature of such drugs, and so, the onus had shifted to him, to prove the contrary, on a balance of probabilities.

[5] Based on the totality of the evidence, there was no affirmative evidence whatsoever that the appellant knew he was carrying heroin; only the presumption under s. 37(d) of the Act says so, and he had rebutted it by his own denial on oath.

[6] There were many material questions left unanswered by the prosecution in this case and coupled with the learned judge's failure to address material aspects of the defence's case, there had been a serious misdirection by way of non-direction. On the totality of the case, the appellant had rebutted the presumption under s. 37(d) of the Act, on a balance of probability. The appellant had established that, even though he had custody and perhaps control of the bag and thereby had possession of it, at the time of his arrest, he had no knowledge whatsoever of its content.

[Appeal allowed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Perayu telah disabitkan oleh Mahkamah Tinggi kerana kesalahan mengedar dadah heroin di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') dan berikutan itu telah dijatuhkan hukuman mati. Rayuan semasa ini adalah oleh perayu terhadap sabitannya itu.

Perayu telah ditahan membawa sebuah beg yang mengandungi heroin. Sambil mengakui bahawa beliau membawa beg itu, perayu telah dengan sesungguhnya menafikan sebarang pengetahuan mengenai kandungan beg itu. Beliau menuntut bahawa beg itu telah diserahkan kepadanya oleh majikannya, seorang bernama Rahman. Pembelaan beliau dengan itu adalah bahawa beliau adalah pembawa yang tidak bersalah.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Alasan penghakiman hakim yang bijaksana sangat tidak memuaskan iaitu penghakiman itu tidak merupakan penghakiman "bermaksud" walaupun pentingnya hal ini telah ditekankan dalam beberapa kes yang telah diputuskan. Penghakiman itu terdiri secara substansialnya dari penghasilan semula testimoni-testimoni saksi pendakwaan dalam bentuk soalan dan jawapan. Hakim yang bijaksana telah gagal untuk menganalisa atau menilai testimoni-testimoni ini tetapi hanya membentangkannya dan dijangkakan telah menerimanya tanpa sebarang soalan. Beliau telah tidak membentangan pembelaan perayu dengan harapan untuk menilainya dan juga tidak menguji pembelaan itu dengan membandingkannya dengan keterangan yang telah dikemukakan oleh pihak pendakwaan.

[2] Seberapa lemah sekalipun sesuatu pembelaan, hakim-hakim perbicaraan, sebagai hakim-hakim bagi fakta dan juga undang-undang tidak seharusnya mengeneoikan pembelaan itu semata-mata atas dasar bahawa saksi-saksi pihak pendakwaan harus dipercayai dan bukannya pihak pembelaan. Di mana undang-undang meletakkan bebanan memberikan penjelasan ke atas seorang tertuduh, dan penjelasan diberikan, yang mana jika ianya konsisten dengan ketidak-bersalahan, maka mahkamah berkewajipan untuk menimbangkan samada ianya berkemungkinan benar, walaupun tidak yakin dengan kebenarannya.

[3] Perkataan "milikan" adalah perkataan yang tidak jelas dan umum, yang mana tidak boleh ditafsirkan dengan teliti. Ianya menunjukkan pengetahuan secara umum mengenai kewujudkan catel dan juga segelintir pendapat di manakah ianya berada agar dapat melaksanakan kawalan ke atasnya walaupun tidak mengetahui sepenuhnya atau dengan tepatnya.

[4] Bebanan ke atas pihak pendakwaan sepanjang kes itu adalah untuk membuktikan kes mereka di luar keraguan yang wajar. Tetapi sebaik sahaja pihak pendakwaan telah membuktikan bahawa perayu mempunyai dalam jagaan atau kawalannya beg yang mengandungi dadah yang dipersoalan itu, maka melalui s. 37(d) Akta tersebut beliau akan dianggap

mempunyai dalam milikan dadah sedemikian dan sebagai telah mengetahui akan sifat dadah yang sedemikian, dan oleh itu, bebanan tersebut telah beralih kepadanya, untuk membuktikan sebaliknya, atas imbangan kebarangkalian.

[5] Berdasarkan keseluruhan keterangan, tidak terdapat keterangan yang bersifat pengakuan apa pun bahawa perayu mengetahui beliau sedang membawa heroin, hanya tanggapan di bawah s. 37(d) Akta tersebut menyatakan sedemikian dan beliau telah menyangkalnya dengan penafiannya sendiri atas sumpah.

[6] Terdapat banyak soalan-soalan penting yang tidak berjawab oleh pihak pendakwaan dalam kes ini dan bersama-sama dengan kegagalan hakim yang bijaksana untuk mengemukakan aspek penting kes pihak pembelaan, terdapat salah-nyataan yang amat serius melalui ketiadaan arahan. Berdasarkan kes itu secara menyeluruh, perayu telah menyangkal tanggapan di bawah s. 37(d) Akta tersebut, atas imbangan kebarangkalian. Perayu telah menetapkan bahawa, walaupun beliau mempunyai dalam jagaan dan mungkin kawalannya akan beg itu dan oleh itu mungkin mempunyai milikannya, pada waktu penahanan beliau, beliau tidak mengetahui mengenai kandungannya sama sekali.

[Rayuan dibenarkan.]

Cases referred to:
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 ***(cit)***
Balasingam v. PP [1959] MLJ 193 ***(cit)***
Leow Nghee Lim v. Rex [1956] 22 MLJ 28 ***(refd)***
Mat v. PP [1963] MLJ 263 ***(cit)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073 ***(cit)***
Murugiah v. PP [1941] MLJ 17 ***(cit)***
Public Prosecutor v. Yuvaraj [1969] 2 MLJ 89 ***(cit)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(d), 39B(1)(a)

[Appeal from High Court, Federal Territory; Criminal Trial No: 47-29-89]

For the appellant - Bhagwan Singh; M/s Bhagwan Singh
For the respondent - Abang Iskandar Abang Hashim DPP

Reported by Ling Hea Hoon

JUDGMENT

Shaik Daud Ismail JCA:

By a majority decision we had allowed this appeal, quashed the conviction and set aside the sentence of death. We indicated then that we would give our reasons in writing and this we now do.

On 27 October 1993, the Kuala Lumpur High Court convicted the appellant for an offence of trafficking in 134.M grams of heroin, under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act). He was accordingly sentenced to death. This was the second time the appellant was before this court. Appellant was previously charged with the same offence before another judge of the Kuala Lumpur High Court on 11 August 1991. At the close of the case for the defence on 14 March 1991, appellant was acquitted and discharged. On appeal by the Public Prosecutor, the Supreme Court, on 4 January 1993, allowed the appeal and ordered a retrial before another judge. At the outset of this appeal, Mr. Bhagwan Singh, assigned counsel for the appellant submitted that, as the appellant had to undergo two trials on the same charge, with the same set of witnesses and being acquitted at one and convicted at the other, is in itself an indication of a grave doubt having been created. The learned Deputy Public Prosecutor (DPP) submitted that the issue before the Supreme Court was on whether the burden on the defence was on a reasonable doubt or on a balance of probability. We hold that, whatever may be the reasons for the order of the re-trial that by itself does not indicate any doubt.

The facts leading to the arrest of the appellant are that on 12 May 1989, as a result of information received, Inspector Lai Joo Wah (SP8) led a police party consisting of DPC 109669 Cheng Siang Kong (SP3), D/Constable Woon Tan Seng and D/Constable Mohamad Shahar to lay an ambush at Jalan Kepong, Jinjang North. It would appear that the informer was also with the police party and it was he who pointed out the appellant as the target. SP3 testified that at about 5pm that day while he and Woon were by the side of Jalan Kepong, Shahar joined them and told them that the target had come out. At the same time SP3 said he saw the appellant alone some 100 metres away coming out of a lane towards Jalan Kepong and he had with him a dark maroon bag under his armpit. Later SP3 said it was a red bag but corrected himself and said it was a dark maroon bag. SP3 said that the appellant walked to the edge of Jalan Kepong stopped and boarded a mini bus going in the direction of Kuala Lumpur. The bus then proceeded towards where SP3 and Woon were and when it arrived near them, SP3 stopped the bus and the entire police party boarded the bus. In the bus SP3 said he saw the appellant seated alone with the bag he was earlier carrying placed on an empty seat next to him. SP3 testified that he and two other police personnel sat behind the

appellant. How SP3 and two other police personnel could sit behind appellant was not explained as all seats on buses, we believe, are for two persons. The bus proceeded all the way to Jalan Tun Perak and when it stopped at a traffic light in front of the Ban Hin Lee Bank, SP3 said appellant alighted carrying the bag with him, followed by him and the other two police personnel. The appellant walked towards Ban Hin Lee Bank and when he arrived in front of the bank, Woon stopped him and identified himself as the police. SP3 said that at that time appellant dropped the bag and started to struggle to free himself. SP3 picked up the bag. Then SP8, who had been following the bus in a car arrived and all three police personnel with the appellant were taken in the car to the Police Contingent Headquarters Kuala Lumpur. Investigations revealed that the bag carried by the appellant contained heroin weighing 134.84 grams as confirmed by the government Chemist Kee Sue Sing (SP7).

The appellant in his defence gave evidence on oath. He testified that the day in question was his son's birthday and while he was at home his employer a Chinese convert by the name of Rahman bin Noh @ Ah Kiong came to his house wanting him to do a job of painting a house in Jinjang. He said he followed Rahman to go and see the house that needed painting and when they could not find the owner of the house he and Rahman went to a coffee shop. There Rahman met with another person and he saw Rahman take a brown bag from his car. Then he and Rahman decided to take a bus home. According to appellant he and Rahman boarded the bus. In the bus Rahman was still holding the brown bag. During the journey and just before he alighted, he said Rahman gave him the brown bag to hold which he did. Rahman being his employer, this act came naturally and no questions were asked. Then Rahman signalled to him to alight and as he was doing so someone held him at the waist band from behind and as a result he fell down and was apprehended and handcuffed. Then he discovered he was arrested by the police. While admitting he was carrying the bag he vehemently denied any knowledge of its content. In other words the defence is one of an innocent carrier.

First and foremost we would like, with respect, to mention here that the grounds of judgment of the learned judge are far from satisfactory in that they do not convey a "speaking" judgment although the importance of this has been stressed in a number of decided cases. (See, for example, *Balasingam v. PP* [1959] MLJ 193 per Ismail Khan J (as he then was) and *Murugiah v. PP* [1941] MLJ 17 per Horne J). They consist substantially of reproduction of prosecution witnesses' testimonies in the form of questions and answers. The learned judge failed to analyse or assess these testimonies. He merely set them out and presumably accepted them without question. He has not set out the defence of the appellant with a view to assessing it, nor has he tested the defence by comparing it with the evidence adduced by the prosecution.